Supreme Court, U.S.
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No. 87-1044

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JESSE HILL,
Petitioner,

v.

DEPARTMENT OF CORRECTIONS
STATE OF FLORIDA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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26 pp

QUESTION PRESENTED FOR REVIEW

WHETHER A STATE AGENCY'S COMMON LAW SOVEREIGN IMMUNITY IS A DEFENSE TO A FEDERAL CIVIL RIGHTS ACTION BROUGHT PURSUANT TO 42 U.S.C. SECTION 1983 AND FILED IN STATE COURT.

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STATEMENT OF THE CASE

The Florida Supreme Court ruled that Florida has not waived its immunity to a federal statutory civil rights claim under 42 U.S.C. Section 1983. Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987). The Florida Supreme Court rendered its opinion in response to a question certified by the District Court of Appeal, Third District of Florida. The question presented was:

> Has the State of Florida, pursuant to section 768.28, Florida Statutes (1983), waived its Eleventh Amendment and state common law immunity and consented to suits against the State and its agencies under 42 U.S.C. §1983?

Department of Corrections v. Hill, 490 So.2d 118, at 120 (Fla. 3d DCA 1986).

While the Florida Supreme Court primarily addressed the issue certified by the Third District Court of Appeal, the

supreme court did confront the issue Petitioner seeks to have reviewed. Hill had contended that the state has no common law immunity against a suit brought under federal law alleging the violation of a federal constitutional right. The Petitioner, at 7-8, states:

> [T]he [Florida Supreme] Court did not address the issues of federal law which this case raised. Rather, it reached its decision that the common law immunity of the state of Florida and its agencies has not been abrogated by 42 U.S.C. Section 1983 without any definitive authority to guide it.

Petition at pp. 7-8.

However, the Florida Supreme Court in Hill, supra, at 131, clearly stated:

> At the outset, we note that even though Quern was a federal court action involving the eleventh amendment, the United States Supreme Court made the statement in that case that Congress, in enacting section 1983, did not intend "to override the traditional

sovereign immunity of the States." 440 U.S. at 341, 99 S.Ct. at 1145.

The Florida high court went on to cite, and extensively quote from, a number of state court decisions throughout the country that had reviewed this issue and which were in accord with the conclusions reached in Quern v. Jordan, 440 U.S. 332 (1979).

SUMMARY OF ARGUMENT

Review of the decision of the Florida Supreme Court is unwarranted because neither Congress nor the Florida Legislature has waived the state's sovereign immunity from suit brought pursuant to 42 U.S.C. Section 1983. There is no conflict in case law on this issue. While there may be philosophical differences as to the need for state liability under this civil rights statute, this Court has previously reviewed this issue and decided that Congress has not expressed an intent to subject the states to liability under this federal law. Congress has the power to abrogate the states' sovereign immunity pursuant to its authority in the Fourteenth Amendment. And pursuant to the supremacy clause contained

in Article VI of the Federal Constitution, such law would be applicable to suits brought in state court. However, Congress has elected not to exercise that power. Under these circumstances, further review of this issue by this Court would be a waste of judicial resources.

ARGUMENT

A GRANT OF CERTIORARI IS NOT WARRANTED IN THIS CASE SINCE THE DECISION OF THE FLORIDA SUPREME COURT RELIES ON SETTLED FEDERAL LAW AND THERE IS NO CONFLICT BETWEEN THE FLORIDA DECISION AND DECISIONS OF THIS COURT OR OF OTHER FEDERAL COURTS.

This Court settled the issue of whether the states are subject to suit under 42 U.S.C. Section 1983 in Quern v. Jordan, 440 U.S. 332 (1979). The Court held that Congress in 1871, in adopting a provision which is now 42 U.S.C. Section 1983, did not intend to override the traditional sovereign immunity of the states and subject them to liability under the Act. In Quern the discussion of the nature of the states' immunity was not limited to Eleventh Amendment immunity. In reaching its determination that Congress had not

expressed an intent to override the states' traditional sovereign immunity, and that the several states therefore were not "persons" for purposes of the statute, this Court stated:

> Given the importance of the States' traditional sovereign immunity, if in fact the members of the 42d Congress believed that s.1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act.

440 U.S. at 343.

While the Eleventh Amendment is a bar to the exercise of the judicial power of the federal courts, this Court has recognized that Eleventh Amendment immunity is merely an exemplification of the states' traditional sovereign immunity directed

towards the federal courts. As stated in Ex parte State of New York No. 1, 256 U.S. 490, at 497 (1921):

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given; not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

It is readily acknowledged that Congress has the authority under the Fourteenth Amendment to abrogate the states' Eleventh Amendment and traditional

sovereign immunity. If Congress were to enact legislation making the states "persons" for purposes of 42 U.S.C. Section 1983, a state could be subjected to liability under the statute, regardless of whether the suit was brought in federal or state court.

In Quern, Justice Brennan realizing the full implication of the majority's opinion, attempted in dissent to characterize the Court's conclusion that a State is not a "person" for purposes of Section 1983 as "patently dicta." However, the majority opinion in response stated:

> Mr. Justice BRENNAN's opinion characterizes this conclusion [that Congress did not intend by the general language of s. 1983 to override the traditional sovereign immunity of the States] as "gratuitous" and "paten[t] dicta." Post, at 1150. But we cannot think of a more "gratuitous" or useless exercise of this Court's discretionary jurisdiction than to decide which of two

> conflicting interpretations of Edelman v. Jordan is correct, if in truth we believed that Edelman itself no longer were valid. The question does not arise out of the blue; it was extensively discussed in our brother BRENNAN's concurrence in Hutto v. Finney last Term. We therefore fail to see how our reaffirmance of Edelman can be characterized as "dicta."

440 U.S. at 341.

The state courts addressing this issue have understood this Court's ruling and have relied on Quern v. Jordan, supra, and its predecessor, Edelman v. Jordan, 415 U.S. 651 (1974), in reaching the conclusion that the states are not subject to liability under 42 U.S.C. Section 1983. See, e.g., Greene v. Friend of Court, Polk County, 406 N.W.2d 433 (Iowa 1987); State v. Green, 633 P.2d 1381 (Alaska 1981); Pyne v. Meese, 172 Cal.App.3d 392, 403, 218 Cal. Rptr. 87, 92 (1985); Merritt v. State, 696 P.2d 871 (Idaho 1985); DeVargas v. State ex rel. N.M. Dept. of Corrections, 640 P.2d

1327 (N.M. Ct. App. 1981); Karchefske v. Dept. of Mental Health, 371 N.W.2d 876 (Mich. App. 1985); Gay v. State of Texas, 730 S.W.2d 154 (Tex.App. 1987); DeBleecker v. Montgomery County, 438 A.2d 1348 (Md. 1982); Kristensen v. Strinden, 343 N.W.2d 67 (N.D. 1983).

This Court has denied certiorari in instances where Petitioners have sought to have this issue reviewed again. See, e.g., Ramah Navajo School Board v. Bureau of Revenue, 720 P.2d 1243 (N.M. App. 1986), cert. denied, _____ U.S. _____, 107 S.Ct. 423, 93 L.Ed.2d 373 (1986); Edgar v. State, 595 P.2d 534 (1979), cert. denied, 444 U.S. 1077, 100 S.Ct. 1026, 62 L.Ed.2d 760 (1980). Unless this Court is now of the view that its position expressed in Quern v. Jordan should be reversed, the petition for writ of certiorari in this case should be denied.

Petitioner attempts to make a number of points why this Court should review the decision of the Florida Supreme Court. Under his first ground for granting review, in discussing concurrent jurisdiction over federal constitutional claims, Petitioner makes the following statement:

> The Court has, however, never considered the question of whether a state must entertain a claim under Section 1983.

Petition at 9.

At best, Petitioner does not understand that concurrent jurisdiction is a distinct concept from sovereign immunity. The question of whether a state court must exercise its jurisdiction to hear a federal constitutional claim is simply not an issue in this case. The Florida Supreme Court did not refuse to exercise its jurisdiction to decide the Petitioner's 1983 claim. It simply ruled that there was no claim

against the state as distinct from individual employees of the state whose actions may have violated Section 1983. The claim must be against an individual, a person, not the state itself. The Florida courts historically have exercised their concurrent jurisdiction to hear civil rights claims. See, e.g., Mazzilli v. Doud, 485 So.2d 477 (Fla.App. 1986); City of Edgewater, 477 So.2d 54 (Fla.App. 1985); Lloyd v. Hines, 474 So.2d 376 (Fla.App. 1985); Rankin v. Coleman, 476 So.2d 234 (Fla.App. 1985); Metropolitan Dade County v. Wolf, 274 So.2d 584 (Fla.App. 1973), cert. denied, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973). Only if a Florida court refused to hear a 1983 claim would this issue be a basis upon which to petition this Court for review on a writ of certiorari.

Petitioner likewise misinterprets Martinez v. California, 444 U.S. 277 (1980). Petitioner cites a number of decisions of this Court in support of the proposition that the Supremacy Clause requires that federal law and policy be applied by the state courts. Petition pages 14 through 16. Respondent State of Florida has no quarrel with that principle. However, Petitioner cites Martinez v. California, supra, as the only decision with which the decision of the Florida Supreme Court in Hill v. Dept. of Corrections is allegedly in conflict. While Petitioner fails to elucidate the exact nature of the conflict, it would appear that he is contending that allowing the state's sovereign immunity to bar a 1983 suit against the state conflicts with

this Court's decision in Martinez. The pertinent language of that decision is set forth in the Petition as follows:

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. Section 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmit a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.

The problem with Petitioner's inference is that Congress has not expressed an intent to make the states "persons" for purposes of 42 U.S.C. Section 1983. The Supremacy Clause has operative effect when there is a controlling constitutional provision or law of the United States enacted pursuant thereof to bind state court judges. Obviously, if Congress

amended 42 U.S.C. Section 1983, pursuant to its authority under the Fourteenth Amendment, to make the states "persons" for purposes of that statute, then clearly the state courts would be bound thereby. Such is not the law. If the Florida Supreme Court's decision in Hill is in conflict with this Court's decision in Martinez, then Quern is also in conflict with Martinez, and this is certainly not the case.

Petitioner's final contention that the states' sovereign immunity results in the total foreclosure of any forum, state or federal, for the redress of civil wrongs is not the law. A suit may be properly brought against a state official in his "personal capacity" for a violation of an individual's civil rights for monetary, declaratory, or injunctive relief. There is no constitutional impediment to civil

rights actions against local governments which are not part of the state for Eleventh Amendment purposes. Monell v. Dept. of Social Services of City of N.Y., 436 U.S. 658 (1978). Injunctive relief is available against state officials. Edelman v. Jordan, 415 U.S. 651 (1974); Ex parte Young, 209 U.S. 123 (1908). Attorney's fees are available in actions brought on behalf of persons who are deprived, under color of state law, of a right secured by the Constitution and laws of the United States whether brought in federal or state court. Maine v. Thiboutot, 448 U.S. 1 (1980).

Congress may at some point decide to subject the states to 1983 claims; however, it has not taken this step. Congress has been on notice for a number of years as to this Court's interpretation of the word "person" as used in 42 U.S.C. Section 1983

and its non-applicability to the several states. Plaintiffs' Bar over the years has sought new ways into the states' coffers, but it is Congress that holds the key to the states' treasuries. And Congress has expressed no intent to use that key.

CONCLUSION

The Florida Supreme Court's decision in Hill v. Dept. of Corrections is consistent with decisions of this Court and other federal courts finding that the states' sovereign immunity bars liability from an action brought pursuant to 42 U.S.C. Section 1983. Congress has expressed no intent to abrogate the states' immunity. Under these circumstances, and in the absence of decisional conflict, certiorari review should be denied.

Respectfully submitted this 22nd day of January, 1988.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S BREIF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA** has been furnished, by U. S. Mail, to Gregg J. Ormond, Esquire, Lisk & Ormond, 200 Aragon Avenue, Coral Gables, Florida 33134, Attorney for Petitioner, this 22nd day of January, 1988.

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